

***United States Court of Appeals  
for the Second Circuit***



**BRIEF FOR  
APPELLANT**



74-2555

To be argued by:  
Gustave Weiss, Esq.

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA, :

Respondent, :

v. :

RICHARD C. PHILLIPS, :

Appellant. :

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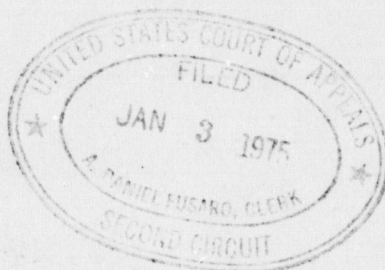
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BRIEF FOR APPELLANT

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APPEAL FROM AMENDED JUDGMENT  
OF CONVICTION IN THE UNITED STATES  
DISTRICT COURT FOR THE  
EASTERN DISTRICT OF NEW YORK



GUSTAVE WEISS, ESQ.  
Attorney for Appellant  
1540 Broadway  
New York, New York 10036

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## QUESTION PRESENTED

Whether it was reversible error for the District Court to find appellant in violation of his special condition of probation where the evidence at the hearing was insufficient to establish said violation.

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA, :

Respondent, :

v. :

Index No.

RICHARD C. PHILLIPS, :

74-2555

Appellant. :

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BRIEF FOR APPELLANT

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PRELIMINARY STATEMENT

This is an appeal from an amended judgment of conviction filed October 10, 1974 (Rayfiel, J.) convicting appellant upon a finding of a violation of probation and imposing a sentence of 3 years pursuant to 18 U.S.C. section 4208(a)(2).

Upon information and belief appellant is presently incarcerated under said judgment.

STATEMENT OF FACTS

On June 17, 1971, the defendant-appellant waived indictment and pleaded guilty to one count of an indictment charging him with a violation of section 922 of Title 18 of the United States Code (Travia, J.).

On October 1, 1971, Judge Travia imposed a sentence of three years, pursuant to section 3651, of which the defendant was to serve 3 months in prison with the balance to be served on probation.

On November 12, 1971, the sentence was modified to the extent that the defendant need serve only 2-1/2 months in prison.

In addition to the general conditions of probation, a special condition was imposed, to wit, that the defendant was directed not to have any involvement with firearms whatsoever.

In a report on an alleged violation of probation by appellant the following violations were set forth:

Condition (1): You shall refrain from violation of any law (federal, state, and local). You shall get in touch immediately with your probation officer if arrested or questioned by a law enforcement officer.

Condition (5): You shall notify your probation officer immediately of any change of your place of residence.

Condition (7): You shall report to the probation officer as directed.

Special Condition: Refrain from dealing,  
possessing, or controlling guns.  
(p. 2 of Report on Violation of  
Probation)

On October 10, 1974 a hearing was held before Judge Rayfiel, United States District Judge, to determine if the appellant was in fact in violation of the aforementioned conditions of probation.

Testimony of Lawrence Myerson

Mr. Myerson testified that he had been assigned to supervise appellant's probation on April 2, 1973 (T.H. at 10).<sup>\*/</sup>

On April 25, 1973 Mr. Myerson received a call from the appellant's mother indicating that appellant had been arrested the previous day in Nassau County for possession of a dangerous weapon, leaving the scene of an accident, and reckless endangerment (T.H. at 11) and that on September 20, 1973 the defendant pleaded guilty to reckless endangerment in the first degree, a Class E felony (T.H. at 14) and was sentenced to five years probation on March 20, 1974 (T.H. at 15).

Mr. Myerson further testified that he had not met appellant until February 1974, because appellant was in custody in Nassau County and there was an in-patient at a psychiatric hospital (T.H. at 16).

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<sup>\*/</sup> All references to the transcript of the Hearing on Violation of Probation shall be herein denoted by the letters "T.H." and the page number.

The witness, through investigation, learned that the appellant was officially discharged from the hospital in January 1974, and failed to report to, or notify, probation of his new address (T.H. at 17).

On February 5, 1974, the witness wrote the appellant a letter and on the 7th of that month received a telephone response from appellant (T.H. at 18).

Mr. Myerson could not testify with certainty that the appellant was ever directed to report to probation on a specific date or at specific intervals (T.H. at 26).

Testimony of Anthony Esposito

Patrolman Esposito testified that on April 24, 1974 he was a member of the Nassau County Police Department on Radio Motor Patrol (T.H. at 28).

Patrolman Esposito stated that he apprehended the defendant after a high speed chase which ended after the defendant's vehicle collided with another vehicle (T.H. at 30-31). Subsequent to the arrest of the defendant Patrolman Esposito frisked the appellant finding no weapon (T.H. at 56). Patrolman Esposito then searched appellant's vehicle and recovered a black attaché case inside of which were three holsters, certain parts of a disassembled firearm, and ammunition (T.H. at 56).

Esposito testified that subsequently the appellant was handcuffed and transported in the rear seat of Esposito's Radio Motor Patrol Car to the police precinct. After the appellant had been removed from the vehicle a search of that vehicle revealed an operable and loaded firearm (T.H. at 50).

The officer further testified that he neither saw the appellant in possession of the weapon found in the vehicle nor could he testify that the officer seated in the rear seat of the Radio Motor Patrol Car ever saw the appellant in possession of the weapon found there (T.H. at 62).

#### Testimony of Richard C. Phillips

The appellant testified in his own behalf at the hearing and denied being in possession of firearms (T.H. at 65-66).

The Assistant United States Attorney stipulated that the appellant was receiving psychiatric treatment (T.H. at 68).

Both sides rested.

#### The Verdict

The court found the appellant to be a probation violator, ordered a psychiatric examination and adjourned the matter for sentence (T.H. at 69).

The Sentence

On October 10, 1974 the court imposed a 3-year sentence under 18 U.S.C. section 4208(a)(2) citing the appellant's failure to respond to psychiatric treatment (S.T. 11).<sup>\*/</sup> The court then stated:

It is apparent to the authorities who conducted the study, that you are subject to emotional impulses which you appear to be unable to control.

What makes your case more difficult is the fact that you have the predilection for guns. And in light of some of the acts that you have committed during the course of time and which are contained, incidentally, in the pre-sentence report, you have had a tendency to be assaultive, and you admitted that to the probation department, so that the possession of guns makes your case a more difficult one.

(S.T. at 12)

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<sup>\*/</sup>"S.T." refers to transcript of Sentence.

ARGUMENT

I.

THAT IT WAS REVERSIBLE ERROR  
FOR THE DISTRICT COURT TO FIND  
THE APPELLANT IN VIOLATION OF  
HIS SPECIAL CONDITION OF PROBATION  
WHERE THE EVIDENCE AT THE HEARING  
WAS INSUFFICIENT TO ESTABLISH  
SAID VIOLATION

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It is clear that this Court has authority to review the findings of a violation of probation by the District Court to determine whether an abuse of discretion has occurred. United States v. Markovich, 348 F.2d 238 (2d Cir., 1965); United States v. Wilson, 469 F.2d 368 (2d Cir., 1972).

In the case at bar the court based its finding of a violation of probation and subsequent sentence primarily on the fact that the appellant had failed to respond to psychiatric treatment (S. T. at 11), was subject to impulses the appellant was unable to control (S. T. at 12), and had violated his special condition of probation, to wit, that he "refrain from dealing, possessing, or controlling guns."

It is clear from the sentencing minutes that Judge Rayfiel, U.S.D.J., considered the possession of firearms in connection with the appellant's psychiatric problems as the reason a jail sentence was called for (S. T. 12).

Thus, if the firearms alleged herein were erroneously considered by the sentencing court, then the sentence imposed was an abuse of discretion and the matter should be remanded for re-sentence. United States v. Brown, 470 F.2d 285 (2d Cir., 1972).

A "firearm" is defined in 18 U.S.C. 921 (a)(3), in pertinent part, as follows:

The term "firearm" means (A) any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; (B) the frame or receiver of any such weapon . . .

The evidence adduced at the hearing established that one gun was found in the Suffolk County Radio Motor Patrol car in which the appellant had been transported some time after the appellant had been removed from the vehicle (T.H. at 62). The evidence clearly establishes that the appellant was frisked prior to being placed in the police car (T.H. at 55-56), that appellant was handcuffed prior to being placed in the police car (T.H. at 56), and that the defendant was never seen in possession of said weapon although he was under constant surveillance from the time of his arrest to the time the gun was found (T.H. at 62). Thus, there was not a scintilla of evidence to connect the appellant with the fully assembled .45 caliber revolver.

So far as the alleged firearm found in a black case in the appellant's vehicle is concerned, the evidence at the hearing fails to establish that

the item found was in fact a firearm at all. Patrolman Esposito testified only that parts of a disassembled gun were found (T.H. at 40). Therefore, there is no testimony that either parts were "readily" convertible "to expel a projectile by the action of an explosive" or that the parts found constituted a "frame or receiver of any such weapon" (18 U.S.C. 921[a][3][A][B]).

In light of the foregoing, the finding of a violation of the special condition was reversible error and its consideration in the imposition of sentence was an abuse of that Court's discretion. McGree v. United States, 465 F.2d 357 (2d Cir., 1972).

CONCLUSION

FOR THE FOREGOING REASONS  
THE MATTER SHOULD BE  
REMANDED TO THE DISTRICT  
COURT FOR A REHEARING ON  
THE VIOLATION OF PROBATION  
OR, IN THE ALTERNATIVE,  
FOR RESENTENCING.

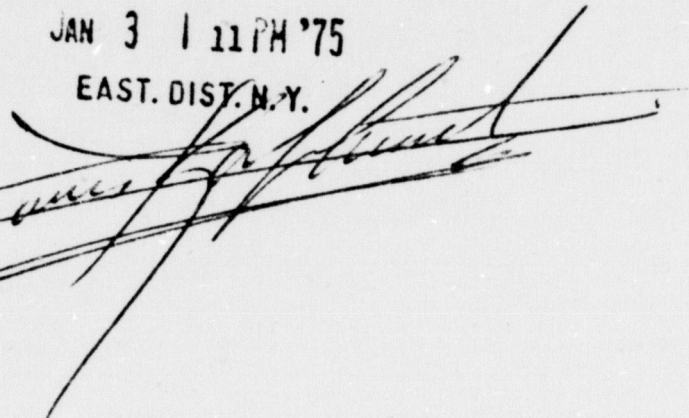
Respectfully submitted,

GUSTAVE WEISS  
Attorney for Appellant  
1540 Broadway  
New York, New York 10036

RECEIVED  
U. S. ATTORNEY

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EAST. DIST. N. Y.

A large, stylized handwritten signature in dark ink is written across the stamp area, crossing over the words "U. S. ATTORNEY" and "EAST. DIST. N. Y.".